Supreme Court, U.S.
FILED

MAY 30 2000

THE CLERK

No. 99-1910

In the Supreme Court of the United States

OCTOBER TERM, 1999

STEVEN DEZAIO,

Petitioner,

–v.–

THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

THOMAS F. BELLO
Counsel of Record
Attorney for Petitioner
STEVEN DEZAIO
387 Forest Avenue
Staten Island, New York 10301
(718) 981-9191

Virgil Mountain, Inc. (212) 779-4046 L5235

250P

QUESTION PRESENTED FOR REVIEW

Whether Petitioner is entitled to 300 days for filing his EEOC Complaint because New York's anti discrimination laws were intended to affect the internal operation of The Port Authority of New York and New Jersey.

Whether or not the Notice of Right to Sue issued by the Equal Employment Opportunity Commission reflected it's jurisdiction status and whether the resulting decision on the merits entitled Mr. Dezaio to Federal Review in the appropriate District Court.

THE PARTIES

The parties are those listed in the caption of this petition.

TABLE OF CONTENTS

Page

Table of Authorities ii

Opinions Below iii

Jurisdictional Statement for this Court iii

Constitutional and Statutory Provisions Involved iv

Statement of the Case 1

Reasons for Granting the Petition 3

Conclusion 7

Appendix A:

Decision of the United States Court of Appeals for the Second Circuit Dated February 29, 2000 ..... A1

Appendix B:

Oral Decision of the United States District Court for the Eastern District of New York (Hon. Jack B. Weinstein, U.S.D.J.) Dated February 1, 1999 ..... A8

Order of the United States District Court for the Eastern District of New York (Hon. Jack B. Weinstein, U.S.D.J.) Dated March 1, 1999 ..... A11

TABLE OF AUTHORITIES

Page

Cases Cited:

Agersen v. Catherwood, 26 NY2d 521, 525, 311 NY2d 886 (1970) 3

Baron v. Port Authority of New York and New Jersey, 968 F. Supp. 924, 927 (SDNY 1997) 3

Rose v. Port Authority of New York and New Jersey, 13 F. Supp. 2d 516 (SDNY 1998) 4

Statutes and Rules Cited:

29 U.S.C. § 621-634 3

29 U.S.C. § 636(d)(2), 633(B) 3

29 CFR 1614.101 4

29 CFR 1614.103 4

29 CFR 1614.103(d) 4

29 U.S.C.S. 621 5

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e) et seq. ..... iv, 3

New York State Human Rights Law, NY Executive § 296 et seq 3

OPINIONS BELOW

The opinion of the United States Court of Appeals appears at Appendix A to the petition and is unpublished.

The opinion of the United States District Court appears at Appendix B to the petition and is unpublished.

JURISDICTIONAL STATEMENT FOR THIS COURT

The date on which the United States Court of Appeals decided my case was February 29, 2000. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Title VII of the Civil Rights Act of 1964
42 U.S.C. §2000 e(5)(e)(1)

> (1) A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceeding with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

No.

In the United States Supreme Court

OCTOBER TERM, 1999

STEVEN DEZAIO,

Petitioner,

-v.-

THE PORT AUTHORITY OF NEW YORK
AND NEW JERSEY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

STATEMENT OF THE CASE

Prior Proceedings:

Steven Dezaio, the Petitioner, submitted an Appellant Brief to the United States Court of Appeals. The brief was submitted respectfully requesting that the Judgment of the United States District Court be reversed. However, the Court of Appeals affirmed the Judgment of the District Court on February 29, 2000.

The Judgment and Order issued by the Honorable Jack B. Weinstein, dated March 1, 1999, from the United States District Court of the Eastern District of New York dismissed Petitioner's complaint on the grounds that the EEOC complaint was untimely filed.

Statement of Facts:

Petitioner, Steven Dezaio, is a male with a date of birth of August 6, 1937. Mr. Dezaio began his employment with the Respondent, The Port Authority of New York and New Jersey (Port Authority) on or about September 26, 1988. Petitioner's employment was terminated by the respondent on January 19, 1996. At the time of his termination Petitioner was fifty-eight years old.

Petitioner filed a complaint with the Equal Employment Opportunity Commission (EEOC) on or about November 1, 1996, alleging violations of the Age Discrimination in Employment Act (ADEA). See Joint Appendix p A-28. Petitioner received the dismissal and Notice of Right to Sue from EEOC on or about June 24, 1997. (See Defendant's Rule 56.1 Statement, Exhibit G).

Petitioner executed an amended complaint which was filed with the EEOC on or about January 28, 1997. See Joint Appendix p A-26. Petitioner timely filed a summons and complaint alleging an ADEA violation upon The Port Authority in the Eastern District of New York on or about September 8, 1997. See Joint Appendix p A-4.

On or about January 19, 1996, after approximately seven (7) weeks after Petitioner's new assignment Petitioner was terminated. See Defendants Rule 56.1 statement, Exhibit G.

REASONS FOR GRANTING THE PETITION

Individual complainants have 180 days from the time of the alleged discriminatory act within which to file charges. 42 U.S.C. § 2000e - 5(e)(1). If a state action has already been initiated, then the complainant has 300 days to file charges. Id. Here, Petitioner filed a complaint with the Equal Employment Opportunity Commission (EEOC) on November 1, 1996, alleging violations of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621-634. Petitioner's EEOC complaint was filed more than 180 days, but less than 300 days.

EEOC complaints filed within 300 days are considered timely as long as the state of filing has an anti-age discrimination law and a state agency established or authorized to enforce such a law. 29 U.S.C § 636 (d)(2), 633(B).

New York State has been regarded as a state with such a state agency and anti discrimination laws of its own, this permitting the extended 300 day period for EEOC filings. *Baron v Port Authority of New York and New Jersey.* 968 F. Supp. 924, 927 (SDNY 1997)

New York has held that the Port Authority is subject to unilateral state laws which regulate the Port Authority's external conduct on New York's laws involving health and safety, insofar as its activities may externally affect the public. *Agersen v. Catherwood,* 26 NY 2d 521, 525, 311 NYS 2d 886 (1970). The New York State Human Rights Law, NY Executive Law Section 296 et seq., such a statute affecting external conduct which is applicable to the Port Authority. However, there have been decisions reached after Agersen that have held that the New York State anti-discrimination law's jurisdiction does not extend to the Port Authority as a bi-state compact agency. *Baron v. Port Authority of New York and*

New Jersey, 968 F. Supp. 924 (SDNY 1997), *Rose v. Port Authority of New York and New Jersey,* 13 F. Supp. 2d 516 (SDNY 1998).

It is the policy of the Government of the United States to provide equal opportunity in employment for all persons, to prohibit discrimination in employment because of race, color, religion, sex, national origin, age or handicap and to promote the full realization of equal employment opportunity through a continuing affirmative program in each agency 29 CFR 1614.101. Here, Petitioner was discriminated against when he was discharged by respondent solely because of his age. It is evident that respondent believes they are above the Federal and State governmental policies and procedures.

29 CFR 1614.103 covers individual and class complaints of employment discrimination and retaliation prohibited by Title VII and the ADEA (discrimination on the basis of age when the aggrieved individual is at least 40 years of age). In this case petitioner was 59 years of age when he was terminated by respondent.

29 CFR 1614.103(d) lists who this part does not apply to and it does not mention the Port Authority of New York and New Jersey as an excluded agency. Here, petitioner filed a complaint with the Equal Employment Opportunity Commission (EEOC) dated November 1, 1996, alleging violation of the ADEA. Petitioner's EEOC complaint was filed more than 180 days, but less than 300 days following the last act of alleged discrimination by the Port Authority of New York and New Jersey.

TITLE 29 LABOR CHAPTER 14 AGE DISCRIMINATION IN EMPLOYMENT 29 U.S.C.S. 621

Congress was attempting to assist older workers not only find new employment but also to be able to retain their current employment and not be terminated or discharged for the unlawful purpose which would violate the ADEA. In 621(b) Congress stated, "....it is therefore the purpose of this act to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment ." Thus it would be more prudent within this congressional spirit to find a looser interpretation or the least stringent interpretation of this Act which will enable petitioner to file a case with the EEOC in a more uniform and systematic manner.

Hence, through the wisdom of Judge Weinstein who points out that Section 626(d) of the Act states, "...filing of charge with Secretary; timeliness; conciliating conference, and persuasion. No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Secretary. Such a charge shall be filed -- (1) within 180 days after the alleged unlawful practice occurred, or within 30 days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier."

Also, Judge Weinstein noted that:

> "....I point out that technically, if you look at the statute, 29 U.S.C 621 [sic] 633, it says, or in case where the alleged discriminatory action occurs in a state which has its own age discrimination law and authority administering that law within three hundred days. It

doesn't say in the statute that the state shall have the authority to act. It just says that the discrimination took place within the state that has it."

The sentence clearly indicates that in order to invoke the 300 day filing, a state need only have a law prohibiting discrimination in employment. New York State has such a law, hence the application of the 300 day statutory period is clearly permissible in this case and other such cases.

The Equal Employment Opportunity Commission has historically accepted only cases that are timely filed and thereafter investigates the merits of the allegations as made by the complaintant. The EEOC by statute issues a Notice of Right to Sue upon completion of its investigation indicating the following "The Commission issues the following determination: Based upon the Commission's investigation, the Commission is unable to conclude that the information obtained establishes violations of the statutes. This does not certify that the respondent is in compliance with the statutes. No finding is made as to any other issues that might be construed as having been raised by this charge." In the alternative the EEOC Notice of Right to Sue does bear on it's face a box which reads "Your charge was not timely filed with the Commission, *i.e.* you waited too long after the date(s) of the discrimination you alleged to file your charge. Because it was filed outside the time limit prescribed by law, the Commission cannot investigate your allegations." which is uniformly checked and adopted by the EEOC when a complaint is filed in an untimely manner.

This Court will be asked to review and determine whether or not the constitutional requirement of equal protection under the law is fairly applied in cases of the Dezaio nature where the EEOC accepts a case and yet the courts do not entertain the jurisdictional statement made by the EEOC. If this arbitrary

standard is allowed to remain in effect and rendered lawful, the unknowing and misinformed public would be deprived of equal protection under the law in violation of the Constitution of the United States.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: Staten Island, New York
May 26, 2000

Respectfully submitted,

THOMAS F. BELLO
Counsel of Record
Attorney for Petitioner
STEVEN DEZAIO
387 Forest Avenue
Staten Island, New York 10301
(718) 981-9191

APPENDIX A

Decision of the United States Court of Appeals for the Second Circuit Dated February 29, 2000

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

STEVEN DEZAIO,
Plaintiff-Appellant,

- v. -

PORT AUTHORITY OF NEW YORK AND NEW JERSEY,
Defendant-Appellee.

Docket No. 99-7372

Before: Sack, Feinberg and Cardamone,
Circuit Judges.

Appeal from a judgment entered April 27, 1999 in the United States District Court for the Eastern District of New York (Weinstein, J.) granting summary judgment for defendant and dismissing plaintiff's complaint.

Affirmed.

THOMAS F. BELLO, Staten Island, New York (Demetrios G. Melis, Law Office of Thomas F. Bello, Esq., P.C., Staten Island, New York, of counsel), for Plaintiff - Appellant.

ANNE M. TANNENBAUM, New York, New York (Milton H. Pachter, Arthur P. Berg, Gerald R. Drasheff, New York, New York, of counsel), for Defendant - Appellee.

CARDAMONE, Circuit Judge:

This is an appeal from a judgment entered April 27, 1999 in the United States District Court for the Eastern District of New York (Weinstein, J.), granting summary judgment to defendant and dismissing plaintiff's complaint. Appellant Steven Dezaio contends on appeal that the district court erred when it dismissed his suit alleging age discrimination on the ground that it was untimely commenced against defendant, the Port Authority of New York and New Jersey (Port Authority). Plaintiff's suit was dismissed because a claimant must file a timely charge with the Equal Employment Opportunity Commission (EEOC) to give that administrative agency an opportunity first to resolve the charge of discrimination. Unless this administrative remedy is exhausted, the district court lacks jurisdiction.

A claim must generally be filed within 180 days after the alleged discriminatory practice, unless the practice occurs in a State that has laws prohibiting the sort of discrimination plaintiff alleges, and also provides a State agency to enforce such laws. If so, claimant has 300 days to file with the EEOC. The dismissal from employment in this case occurred in New York which has both anti-discrimination laws and a State enforcement agency. Plaintiff filed with the EEOC just 14 days before the 300 days expired, but 106 days (over three months) after the 180 day period of limitations had expired.

Unfortunately for plaintiff it is the shorter period that applies to his case because his employer, the Port Authority of New York and New Jersey, is not subject to the discrimination laws of New York. This rule trips up laypersons and lawyers alike because more often than not most people are unaware of this qualification regarding employers not subject to the discrimination laws in States like New York that have such comprehensive laws.

Appellant professes he was unaware of the qualification of the 300-day rule that ordinarily applies in discrimination suits brought in federal court in New York.

Be that as it may, ignorance of the law excuses no one; not because courts assume everyone knows the law, but because this excuse is one all will plead and no one can refute. Consequently, to be certain of preserving his rights, an employee believing himself the object of wrongful discrimination has six months from the date of that act to file a claim with the EEOC, otherwise his rights to legal redress in court may be lost. Here that right was lost for failure to timely file his complaint with the EEOC within 180 days of his discharge from employment.

BACKGROUND

On January 19, 1996 the Port Authority notified plaintiff that it was terminating his employment as part of a reduction-in-force. At the time, Dezaio had been employed by defendant for just over seven years and was 58 years old. He filed what he styles a "charge of discrimination" with the EEOC on November, 1996 -- 286 days after the alleged discriminatory act -- claiming that his discharge violated the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. § 621 et seq. (1994). Some dispute exists as to whether plaintiff's initial EEOC filing satisfied the EEOC's procedural requirements for filing a charge, but it is undisputed that the acts underlying the EEOC complaint occurred in New York.

The Port Authority is an unusual public authority. It came into being in 1921 when, pursuant to the Constitution, U.S. Const. Art. I, § 10, cl.3, Congress approved a Compact between the States of New York and New Jersey to develop public transportation, terminal, and other facilities of

commerce within the statutory Port District that embraces portion of both States. See 42 U.S. Stat. Ch. 77 (1921), consenting to 1921 N.J. Laws Ch. 151 and 1921 N.Y. Laws Ch. 154. The Compact is codified at N.Y. Unconsol. Law §§ 6401-23 (McKinney 1979 & Supp. 1999). Among the 33 facilities over which the Port Authority exercises control are airports, interstate bridges and tunnels, a railroad, bus stations, marine and truck terminals, and the World Trade Center.

After a hearing, the district court issued an order filed March 11, 1999, granting the motion for summary judgment and dismissing the complaint. Judgment was entered on April 27, 1999 from which this appeal was taken.

DISCUSSION

We review the dismissal of a complaint for lack of subject matter jurisdiction de novo. See Robinson v. Overseas Military Sales Corp., 21 F. 3d 502, 507 (2d Cir. 1994).

Before bringing a suit under the ADEA, a claimant must file with the EEOC as provided by 29 U.S.C. § 626 (d) (1994). As earlier recited, that statute generally requires a charge to be filed with the EEOC within 180 days after the alleged unlawful practice occurred or within 300 days where the alleged unlawful practice occurred in " a State which has a law prohibiting discrimination in employment because of age and establishing or authorizing a State authority to grant or seek relief from such discriminatory practice, " 29 U.S.C. § 633 (b) (1994) (emphasis added). The reason for this is to exhaust administrative remedies with an eye toward conciliation and resolution of the alleged practice that brought about the discrimination claim without the need to resort to litigation. New York has a law prohibiting age

discrimination in employment. N.Y. Exec. Law § 291 (1) (McKinney 1993 & Supp. 1999). In addition, New York's Division of Human Rights may grant or seek relief from such discrimination. See id. §§ 293-95.

An examination of these State statutes reveals that neither New York anti-discrimination law nor the State Division of Human Rights' jurisdiction extends to the Port Authority. Although the New York Court of Appeals has not addressed the question, the Appellate Division has explicitly approved a lower court holding which ruled that any application of New York's human rights law against the Port Authority would violate the bi-state Compact creating the Authority. See Bailey v. Port Auth. Of New York & New Jersey, 216 AD2d 42 (1st Dep't 1995), aff'q No. 40149/92 (N.Y. Sup. Ct. May 3, 1994). Bailey squares with the Court of Appeals decision in Agesen v. Catherwood, 26 NY2d 521 (1970), which held that New York's minimum wage law does not govern wages paid to Authority employees. That case teaches that internal operation of the Authority -- unlike its external conduct which is subject to each of the Compact State's health and safety laws -- are independent from the unilateral control of either State without the other's concurrence. See id. At 525. As a result, New York's anti-discrimination laws are not controlling with respect to the time limitations that govern when an individual must file a charge of discrimination with the EEOC. In addition, the State Division of Human Rights has ruled at least twice that it lacks jurisdiction over the Port Authority. See Settecase v. Port Auth.of New York & New Jersey, 13 F. Supp. 2d 530, 535 (S.D.N. Y. 1998) (citing those decisions).

Nothing has been cited suggesting that New York's or New Jersey's anti-discrimination laws were intended to affect the internal operation of the Port Authority. That is, it does not appear that either State legislature intended those

laws to amend the provisions of the Compact or, more particularly, those provisions that pertain to the Port Authority. As a consequence, to apply unilaterally New York's human rights laws in this case would violate the bi-state Compact. It follows that even in a deferral jurisdiction like New York, where the State's fair employment practices agency has no jurisdiction over the employer, that employer is to be viewed as if it were in a non-deferral State, and accordingly, the 180-day limitation period applies in the case of an employee of the Port Authority.

While the issue of what time limitations control the filing of discrimination claims against the Port Authority, involving both federal and New York law, is one of first impression in this Circuit, the weight of federal authority supports the view we have taken. Under the relevant federal regulation, a "jurisdiction having a FEP [fair employment practices] agency without subject matter jurisdiction having no FEP agency." 29 C.F.R. § 1601.13 (a) (2) (1999). As the trial court noted, decisional law in this Circuit uniformly holds that the Port Authority lies outside New York's anti-discrimination regime. See Baron v. Port Auth.of New York & New Jersey, 968 F. Supp. 924, 929 (S.D.N.Y. 1997); Rose v. Port Auth.of New York & New Jersey, 13 F. Supp 2d 516, 523 (S.D.N.Y. 1998); cf. Settecase, 13 F.Supp. 2d at 535 (Title VII and Americans with Disabilities Act claims).

In an analogous case, involving New Jersey anti-discrimination law, the Third Circuit held -- consistent with the views expressed in this opinion -- that State's laws do not apply to the Port Authority. See King v. Port Auth.of New York & New Jersey, 106 F.3d 385 (3d Cir. 1996), aff'g 909 F. Supp.938, 945 (D.N.J. 1995). These decisions fit comfortably within the Supreme Court's statement that "bistate entities created by compact . . . are not subject to the unilateral control of any one of the States that compose the

federal system." Hess v. Port Auth. Trans-Hudson Corp., 513 U.S. 30, 42 (1994).

CONCLUSION

We conclude therefore that plaintiff is not entitled to assert an ADEA claim against the Port Authority because he failed to file a charge with the EEOC within 180 days after the alleged unlawful practice occurred. Such reduced time from the generally prevailing 300 days period for filing charges limits plaintiff's rights because under New York law the Port Authority lies outside the reach of new York State's anti - discrimination laws and outside the jurisdiction of the New York Division of Human Rights.

For the reasons stated the judgment dismissing plaintiff Dezaio's complaint is affirmed, without costs to either party.

APPENDIX B

Oral Decision of the United States District Court for the Eastern District of New York (Hon. Jack B. Weinstein, U.S.D.J.) Dated February 1, 1999

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK — CV 97-5206

STEVEN DE ZAIO,
Plaintiff,
- against -
P.A. OF N.Y. & N.J.,
Defendant.

United States Courthouse
Brooklyn, NY

February 1, 1999
9:45 o'clock a.m.

TRANSCRIPT OF MOTION
BEFORE THE HONORABLE JACK B. WEINSTEIN
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff: THOMAS F. BELLO, ESQ.

For the Defendant: GERALD R. DRASHEFF, ESQ.

Court Reporter: Gene Rudolph
225 Cadman Plaza East
Brooklyn, New York
(718) 254-7215

Proceedings recorded by mechanical stenography, transcript produced by computer-aided transcription.

THE CLERK: Civil cause for motion, Steven DeZaio verses Port Authority of New York and New Jersey.

THE COURT: I will be happy to hear you. I have read all your papers.

I take it, the main point is the 180 or 300-day time period, and that depends upon whether the Port Authority is subject to New York State law.

MR. DRASHEFF: Yes. To that particular statute, yes.

THE COURT: Yes.

Normally I would find in favor of the plaintiff, but I feel that it is desirable to have uniformity here. We do have a decision by Judge Gleeson and a number of them in the Southern District, and until and unless the Second Circuit changes the rule, I am going to apply it.

I point out that technically, if you look at the statute, 29 U.S. Code 621, it says, "or in case where the alleged discriminatory action occurs in a state which has its own age discrimination law and authority administering that law within three hundred days."

It doesn't say in the statute that the state shall have the authority to act. It just says that the discrimination took place within the state that has it.

The discrimination here took place partly in New York. New York has that, so technically if you read the statute woodenly, as I think you should, in favor of the plaintiff, the three hundred days apply.

He was discriminated against within the State of New York. New York does have its own age discrimination law, ergo three hundred applies.

The difficulty is in part that 29 CFR 1601.13(a) (1) (2) says that if the jurisdiction, that is, New York, has an FEP agency without subject matter jurisdiction over a charge, that is equivalent to jurisdiction having no FEP agency.

So under the Code, 180 applies. Under the statute, as I think it could be read, 300 applies.

I am going to apply what I consider the Eastern District-Southern District rules. If you disagree with the present ruling, you will have to take it up on appeal.

MR. BELLO: Yes, Your Honor.

THE COURT: Dismissed

MR. BELLO: We will do that.

THE COURT: As you know, as to the state causes of action, the same thing is true essentially; that is, dismissal is required. Dismissed. No costs or disbursements. Anything further?

MR. DRASHEFF: No, nothing.

THE COURT: I am perfectly willing to reinstate the case if we get a Second Circuit decision favorable to plaintiff. Thank you.

MR. BELLO: Thank you, Your Honor.

MR. DRASHEFF: Thank you.

THE COURT: All right.

(Matter concludes.)

Order of the United States District Court for the Eastern District of New York (Hon. Jack B. Weinstein, U.S.D.J.) Dated March 1, 1999

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

STEVEN DEZAIO,	ORDER
v.	CV97-5206
THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY	(JBW)

For the reasons stated orally on the record, the motion for summary judgment is granted. The case is dismissed. No costs or disbursements.

So Ordered

/s/
JACK B. WEINSTEIN
U.S.D.J.

Date-:3/1/99

Supreme Court, U.S.
FILED
JUN 21 2000
CLERK

(2)

No. 99-1910

In the Supreme Court of the United States

OCTOBER TERM, 1999

STEVEN DEZAIO,

Petitioner,

–v.–

THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

MILTON H. PACHTER
Counsel of Record
Attorney for Respondent
THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY
One World Trade Center—66N
New York, New York 10048
(212) 435-6836

On the Brief:
ARTHUR P. BERG
ANNE M. TANNENBAUM

Virgil Mountain, Inc. (212) 779-4046 L5257

11 pp

TABLE OF CONTENTS

Page

Table of Authorities ii

Counterstatement of Opinions Below iv

Counterstatement of Statutory and Regulatory Provisions Involved v

Counterstatement of the Case 1

Reasons for Denying the Petition 2

Conclusion 5

TABLE OF AUTHORITIES

Page

Cases Cited:

Baldwin Cty. Welcome Ctr. v Brown, 466 U.S. 147 (1984) 4

Equal Employment Opportunity Commission v Commercial Office Products Co. 486 U.S. 107 (1988) 4 n.1

Hess v. Port Auth. Trans Hudson Corp., 513 U.S. 30 (1994) 2

Irwin v. Dep't. of Veterans Affairs, 498 U.S. 89 (1990) 4

Mohasco Corp. v. Silver, 447 U.S. 807 (1980)..... 3, 4 n.1

Oscar Meyer & Co. v. Evans, 441 U.S. 750 (1979)..... 4 n.1

Zipes v. Trans World Airlines, Inc., 455 U.S. 385 (1982) 3

Constitutional Provisions Cited:

Fourteenth Amendment – Equal Protection Clause 4

Statutes and Rules Cited:

29 CFR §1601.13(a)(2)..... v, 4

29 CFR §1614.103(d) 3

29 U.S.C. §633(b) ..... v, 3, 4

TABLE OF AUTHORITIES

Page

Statutes and Rules Cited:

New York State Human Rights Law, N.Y. Exec. L. §291(1) (McKinney's 1993 and Supp. 1999) 2

Supreme Court Rules Cited:

10(a) 2

10(c) 2

COUNTERSTATEMENT OF OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit (A1-7) is reported at 205 F.3d 62 (2d Cir. 2000).

COUNTERSTATEMENT OF STATUTORY AND REGULATORY PROVISIONS INVOLVED

29 U.S.C. §633(b)

> In the case of an alleged unlawful practice occurring in a State which has a law prohibiting discrimination in employment because of age and establishing or authorizing a State authority to grant or seek relief from such discriminatory practice, no suit may be brought under section 626 of this title before the expiration of sixty days after proceedings have been commenced under the State law, unless such proceedings have been earlier terminated ...

29 CFR §1601.13(a)(2)

> A jurisdiction having a FEP agency without subject matter jurisdiction over a charge (e.g., an agency which does not cover sex discrimination or does not cover nonprofit organizations) is equivalent to a jurisdiction having no FEP agency. Charges over which a FEP agency has no subject matter jurisdiction are filed with the Commission upon receipt and are timely filed if received by the Commission within 180 days from the date of the alleged violation.

No. 99-1910

In the United States Supreme Court

OCTOBER TERM, 1999

STEVEN DEZAIO,

Petitioner,

-v.-

THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

COUNTERSTATEMENT OF THE CASE

For purposes of the instant brief, respondent, the Port Authority of New York and New Jersey (Port Authority), accepts the statement of facts (as opposed to any conclusions of law) as recited in the petition of Steven Dezaio (petitioner). The Port Authority wishes to point out, however, that there is no dispute that all filings with the Equal Employment Opportunity Commission (EEOC) on behalf of petitioner were made by counsel.

REASONS FOR DENYING THE PETITION

The Court of Appeals Below Correctly Decided the Case In Accordance With Settled Precedent.

Although petitioner's arguments are hardly a model of clarity, what is clear is that petitioner presents absolutely no basis whatsoever for invoking this Court's certiorari jurisdiction. Thus, petitioner is unable to make even an arguable claim either that the decision of the Second Circuit below conflicts with a decision of another Circuit Court of Appeals or of the New York State Court of Appeals within the meaning of Rule 10(a) of this Court, or that the decision conflicts with any relevant decisions of this Court pursuant to Rule 10(c). In fact, quite to the contrary, the opinion of the Second Circuit below was correctly decided fully in accordance with relevant precedents of this Court, as well as those of the New York State courts and the State's Division of Human Rights (DHR).

More specifically, beyond merely stating his unsupported proposition that the New York State Human Rights Law, N.Y. Exec. L. §291(1) (McKinney's 1993 & Supp 1999) is "a statute affecting external conduct which is applicable to the Port Authority" (Pet. at 3), petitioner does not even attempt to demonstrate how the Second Circuit erred in holding, in accordance with relevant state judicial and administrative authority, that the statute is not such an enactment (A5-7). Nor does petitioner even attempt to reconcile his argument regarding the Human Rights Law with this Court's statement that "bistate entities created by compact ... are not subject to the unilateral control of any one of the States that compose the federal system." *Hess v. Port Auth. Trans Hudson Corp.*, 513 U.S. 30, 42 (1994), upon which the Court of Appeals below relied (A2).

Moreover, petitioner's citation of 29 CFR §1614.103(d), relating to the jurisdiction of the EEOC (Pet. at 4), is a glaring *non-sequitur*. The jurisdiction of the EEOC is not at issue in this matter. Rather the issue is petitioner's compliance with the statutory limitations provisions regarding filing with the agency under the Age Discrimination in Employment Act (ADEA). See *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 394 (1982).

Furthermore, in arguing that 29 U.S.C. §633(b), the ADEA's deferral provision, "indicates that in order to invoke the 300 day filing, a state need only have a law prohibiting discrimination in employment" (sic) (Pet. at 6), petitioner completely ignores this Court's decision in *Mohasco Corp. v. Silver*, 447 U.S. 807 (1980). In *Mohasco*, this Court made it absolutely clear that there was nothing in the legislative history of the Civil Rights Act that gave complainants in deferral jurisdictions, such as New York, the right to proceed with less diligence than those in non-deferral jurisdictions. In explaining the operation of and purpose behind the deferral provisions of Title VII, this Court stated:

> The history identifies only one reason for treating workers in deferral States differently from workers in other States: to give state agencies an opportunity to redress the evil at which the federal legislation was aimed, and to avoid federal intervention unless its need was demonstrated. *The statutory plan was not designed to give the worker in a deferral State the option of choosing between his state remedy and his federal remedy, nor indeed simply to allow him additional time in which to obtain state relief.* (Emphasis added)

447 U.S. at 821[1]. Consequently, where, as here, there is no state fair employment practices agency (FEP) with subject-matter jurisdiction over the discrimination charge, the EEOC regulation, 29 CFR §1601.13(a) (2), as correctly found by the Second Circuit below (A6), applies the 180-day limitations period, not the 300-day period. Indeed, the district court's comments to the contrary notwithstanding (A9), there is simply nothing whatsoever inconsistent with the EEOC's regulation requiring that a state FEP have jurisdiction "over a charge" and the language of 29 U.S.C. §633(b) providing for deferral where a cause of action arises in a state that has "authoriz[ed] a State authority to grant or seek relief from such discriminatory practice."

Finally, petitioner fails to explain just precisely how the EEOC's arguable checking of an inappropriate box on petitioner's "Right to Sue Letter" (Pet. at 6) raises any claim whatsoever under the Fourteenth Amendment's Equal Protection Clause. However, insofar as petitioner may appear to be attempting to establish that he somehow was "misled" by the EEOC, or was "prejudiced" because the EEOC may actually have investigated his untimely charge, it should be noted that petitioner failed to raise any such issue either before the district court or the circuit court below and any such claim therefore must be considered waived. In any event, "equitable tolling" would be inappropriately invoked herein where the claimant at all times was fully counseled. See *Irwin v. Dep't. of Veterans Affairs,* 498 U.S. 89, 95-96 (1990); *Baldwin Cty. Welcome Ctr. v Brown*, 466 U.S. 147, 150 fn. 4 (1984).

---

[1] The *Mohasco* rationale applies as well to ADEA actions. See *Equal Employment Opportunity Commission v Commercial Office Products Co.* 486 U.S. 107, 123 (1988); see also *Oscar Meyer & Co. v. Evans*, 441 U.S. 750, 755-756 (1979).

Since petitioner has wholly failed to demonstrate that the decision of the Court of Appeals below was, in any way, erroneous, the petition for a writ of certiorari should be denied in its entirety.

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: New York, New York
June 20, 2000

Respectfully submitted,

MILTON H. PACHTER
Counsel of Record
Attorney for Respondent
THE PORT AUTHORITY OF
NEW YORK AND NEW JERSEY
One World Trade Center—66N
New York, New York 10048
(212) 435-6836

On the Brief:
Arthur P. Berg
Anne M. Tannenbaum